



72-SBE-038

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

'In the Matter of the Appeal of)
A. H. AND ADELAIDE KARPE)

For Appellants: Curtis Darling
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

John D. Schell
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of A. H. and Adelaide Karpe against a proposed assessment of additional personal income tax in the amount of \$1,043.10 for the year 1966.

Appellant A. H. Karpe was married to Birda M. Viera until their divorce in June, 1956. At that time an action was pending in the federal courts in which appellant sought to recover an overpayment of his separate income tax which had been 'credited to Birda's separate deficiency for the same year. Birda was joined as a defendant in the action by the United States and incurred legal fees in the amount of \$14,748.44. In view of the fact that this action was pending at the time of their divorce, a property settlement agreement between appellant and his former wife provided that appellant would bear all attorney's fees incurred by her in connection with the pending tax litigation. Appellant paid the legal fees in 1966 and deducted the full amount on his personal income tax return for 1966 as legal expenses related to tax litigation. Respondent disallowed the deduction in its

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entirety and proposed an additional assessment. The proposed assessment was protested by appellant and this appeal followed.

The issue for determination is whether appellant may deduct a payment made pursuant to a property settlement agreement for attorney's fees incurred by his former wife in contesting her tax liability.

California Revenue and Taxation Code section 17252 provides in part :

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

* * *

(c) In connection with the determination, collection, or refund of any tax.

This provision is identical to section 212(3) of the Internal Revenue Code of 1954.

Appellant contends that the statute does not restrict the deduction to payments made in connection with the determination, collection, or refund of the taxpayer's tax, but rather, encompasses payments made in relation to any tax liability. Appellant's position is foreclosed by United States v. Davis, 370 U.S. 65 [8 L. Ed. 2d 335] where it was held that the statute in question, although it referred to "any tax, " meant the individual's own tax or a tax for which he is legally liable to the taxing agency. (See Raymond A. Biggs, T.C. Memo., 1968; Southern Arizona Bank & Trust Co. v. United States, 386 F.2d 1002, 1005). The United States Supreme Court, in concluding that a wife's expenses incurred in tax litigation which were paid by her former husband were not deductible by him, stated:

Here the fees paid her attorney do not appear to be "in connection with the determination, collection; or refund" of any tax of the taxpayer. As the Court of Claims found, the wife's attorney "considered the problem from the standpoint of his client

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alone. Certainly then it cannot be said that ...[his] advice was directed to [taxpayer's] tax problems. ..." United States v. Davis, supra, 370 U.S. 74, 75. (Emphasis added.)

Appellant argues, however, that the payment is deductible within the rule of the Davis case since the payment of Birda's attorney's fees affected his estate within the meaning of the rule. We cannot agree. In order to be deductible under the rule of Davis the attorney's fees must be directly and only connected with the taxpayer's estate. (Davis v. United States, 287 F.2d 168, 171, aff'd, 370 U.S. 65 [8 L. Ed. 2d 335].) However, in the instant matter the attorney's fees incurred on behalf of Birda were directly and only connected with her estate and not the estate of appellant. Any connection which they had with his estate was indirect and collateral.

Accordingly, we conclude that the legal expenses paid by appellant on behalf of his former wife are not deductible within the purview of section 17252, subdivision (c), of the Revenue and Taxation Code.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of A. H. and Adelaide Karpe against the proposed assessment of additional personal income tax in the amount of \$1,043.10 for the year 1966, be and the same is hereby sustained.

Done at Sacramento, California, this 14th day of November, 1972, by the State Board of Equalization.

John W. Lynch, Chairman
John G. [unclear], Member
Geoff [unclear], Member
Dallan G. [unclear], Member
_____, Member

ATTEST: W.W. [unclear], Secretary